(3)

No. 00-982

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

UDO BIRNBAUM,

Petitioner,

v.

RICHARD RAY; TOMMY W. WALLACE; JAMES B. ZIMMERMANN; RICHARD DAVIS; PAT MCDOWELL, JUDGE; LESLIE P DIXON; BETTY DAVIS; WILLIAM JONES; BECKY K. MALONE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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10 pp + f/b

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ARGUMENT

Note: "Respondents" in this Reply Brief in Opposition means respondents Betty Davis and Becky Malone.

I. THE ISSUES BEFORE THIS COURT ARE ISSUES OF LAW UPON WHAT THE COURTS BELOW DID. RESPONDENTS' DISPUTES UPON DIVERGENT VERSIONS OF THE FACTS BELONG IN DISTRICT COURT.

Of course, the respondents are going to deny that their conduct did in fact violate RICO, and of course their version of the facts is that they did not participate with any of the other defendants in a RICO enterprise either.

This Appeal, however, is upon a FRCP 12(b)(6) dismissal, and these particular respondents' versions of the facts, in so far as they conflict with Plaintiff/Petitioner's version, are of no more importance than the versions of all the rest of the defendants who chose to not respond with their versions of the facts.

The material issues of fact are whether there was a violation of RICO, whether Petitioner/Plaintiff Birnbaum was injured by reason of such violation, and who all participated. Indeed these particular respondents may well have been minor players, but only a determination upon the totality of the evidence can establish such.

The issues of law before this Court is upon the Questions Presented:

1. Whether 18 U.S.C. § 1964(c) ("civil RICO") permits use of the *Rooker/Feldman* claim preclusion doctrine to keep plaintiff from showing his cause when the pleadings and evidence shows the initiation of the state court proceedings was itself an overt act in behalf of the alleged RICO enterprise.

2. Whether 18 U.S.C. § 1964(c) ("civil RICO") permits dismissal of individual defendants under FRCP 12(b)(6) when plaintiff has pled all the elements of civil RICO and brought evidence of each defendant's conduct.

II. THESE RESPONDENTS' VERSION OF THE FACTS DIFFER FROM PETITIONER/PLAINTIFF'S ALLEGATIONS AND SHOULD NOT BE BELIEVED UNDER A FRCP 12(b)(6) DISMISSAL.

This Appeal and Petition for a Writ of Certiorari is upon a district court's dismissal of a civil RICO cause by the granting of individual FRCP 12(b)(6) motions to dismiss (See Petition for Writ, page 2 and Appendix 12, 13). There was no discovery and never a hearing, and Petitioner's version of the facts is to be believed and all inferences drawn in his favor. Petitioner responds to these respondents' versions of the facts:

1. Respondents' version of the facts: *"The litigation arises from a dispute involving a beaver dam on Birnbaum's property." Respondents page 2.*

On the contrary, the beaver dam litigation scheme arose out of an existing RICO enterprise to bring just such frivolous suits for the purpose of extorting "legal

fees", i.e., the RICO enterprise was well in place before it arose upon Birnbaum. Petioner/Plaintiff's allegation was:

> "This action arises out of a scheme round and about the 294th District Court in Canton, Texas ("Wallace's Court") in which one or more of the Defendants attempted to "enrich" themselves by using their relationships in the Court to extort legal fees, moneys, and other valuable things, by the use of fraudulent documents, arguments, and corrupt Court process as weapons for malicious prosecution. As used in this Complaint, the term "enrich" includes maintaining or securing employment, status, influence, personal power, and/or assurances of each other's present and future support." First Amended Complaint, paragraph 1.

2. ***Respondents' version of the facts:*** *"Birnbaum contended that certain alleged, isolated events on the part of Davis and Malone made them racketeers. The sole allegations against Betty Davis regarded the issuance or non-issuance of notices and the relaying of simple information about the Beaver Dam Case" Respondents page 9. Similar statement Respondents page 3.*

Petitioner Birnbaum alleged that these were not isolated events, but part of a larger pattern of racketeering to defraud him of honest service. Birnbaum alleged that Betty Davis knowingly and willingly participated with the other defendants in a scheme to defraud him of honest judicial service, and that she did so by abuse of the authority entrusted in her by her position. Of course, the respondents' version of the facts will differ from the Plaintiff's, i.e., that they did not violate RICO.

3. ***Respondents' version of the facts:*** *"Birnbaum's entire federal complaint relies on the assertion that the state-court proceeding is void because of the racketeering activities of Respondents Davis, Malone, and others." Respondents page 5, 6.*

Petitioner/Plaintiff Birnbaum does not contest any state-court determinations, for there were none, and was very pleased by the jury's verdict. Birnbaum's complaint relies on the violation of the RICO statute by a scheme to extort and upon defrauding him of honest service.

III. THESE RESPONDENTS' VERSION OF THE STATE-COURT PROCEEDINGS DIFFER FROM PETITIONER/PLAINTIFF'S ALLEGATIONS, AND SHOULD NOT BE BELIEVED UNDER A FRCP 12(b)(6) DISMISSAL.

Dismissal was under FRCP 12(b)(6) and these particular respondents' version of the facts should not be believed:

1. ***Respondents' version of the facts:*** *"The jury awarded no damages to Jones, but awarded him $10,000 in attorney's fees." Respondents page 3.*

The jury determined that there was exactly ZERO damages. There never was a judgment, and no attorney's fees were awarded to either party. See Exhibit 1.

2. ***Respondents' version of the facts:*** *"Birnbaum was unsatisfied with the trial court action, and filed the instant suit in federal district court." Respondents page 3.*

Petitioner/Plaintiff Birnbaum was very satisfied that the jury found ZERO damages, i.e., that the RICO enterprise had not been able to run over him, but was very unsatisfied to have been damaged in time, money, and anguish by the RICO enterprise's attempt to run over him, and the continuing threat of such activity in the community, and decided to pursue this matter as a "private attorney general" by bringing a civil RICO suit. See Petition for Writ.

IV. THESE RESPONDENTS FAILED TO ADDRESS THE BRIEFING ISSUE THAT A JURY CAN FIND UPON THE TOTALITY OF THE EVIDENCE, INCLUDING THE FALSEHOODS IN THEIR STATEMENTS.

These defendants are relying on their individual versions of the facts to counter Petitioner/Plaintiff Birnbaum's civil RICO cause. The issue at bar is whether these defendants participated in a RICO scheme in concert with the other defendants. A jury can find upon the totality of the evidence, including the falsity of the explanations put forward by a defendant:

> "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the [employer] was dissembling to cover up a [discriminatory] purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." *Reeves v. Sanderson Plumbing*, Supreme Court 99-536 (June 12, 2000), quoting *Wright v. West*, 505 U.S. 277, 296 (1992).

V. THESE RESPONDENTS' VERSION OF THE EXISTENCE OF A STATE-COURT JUDGMENT CONFLICTS WITH THE EVIDENCE.

Petitioner/Plaintiff Birnbaum makes the following replies to these respondents' arguments at law upon a supposed state-court judgment:

1. Respondents' version of the facts: *"Birnbaum particularly relies upon this Court's statement that '[t]he object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, "private attorneys general", dedicated to eliminating racketeering activity.' However he cites no authority for his conclusion that this object allows a private RICO plaintiff to challenge a state-court decision in federal district court." Respondents page 7, 8.*

Birnbaum is not challenging a state-court decision, for the RICO scheme did not succeed. No judgment against him was obtained as indicated by the Clerk's certification, which states:

> TO WHOM IT MAY CONCERN:
>
> I, Nancy Young, District Clerk, Van Zandt County, Texas, certify that on this day, searched the records in the 294th Judicial District Court and have found in cause number 95-63, styled William B. Jones Vs. Udo Birnbaum, there exists no final judgment, and no judge is currently assigned to this cause. The last entry on the docket sheet is September 28, 1998. Attached hereto and made a part hereof is a certified copy of four pages of the Civil Docket regarding this case.
>
> Signed this 22nd day of August, 2000.

Nancy Young, District Clerk
Van Zandt County, Texas

All parties to this cause, as part of the proceedings in the Fifth Circuit, had been provided with this document (Exhibit 1), and it is noteworthy that these, the only respondents in opposition to Birnbaum's Petition for writ, never come right out and state that there was a state-court judgment, but nevertheless keep arguing points of law about state court "decisions" and "judgments" in support of the Fifth Circuit's finding under the *Rooker/Feldman* Doctrine upon state-court proceedings.

CONCLUSION

Respondents' doctrinal argument cannot overcome the statutory language and legislative intent of civil RICO, and especially so where the very doctrines argued are at issue by the Questions Presented. Respondents' arguments at law are also flawed by erroneous versions of the facts.

Birnbaum respectfully requests that this Court grant his Petition for writ or certiorari for the reasons stated in his Petition.

Respectfully submitted,

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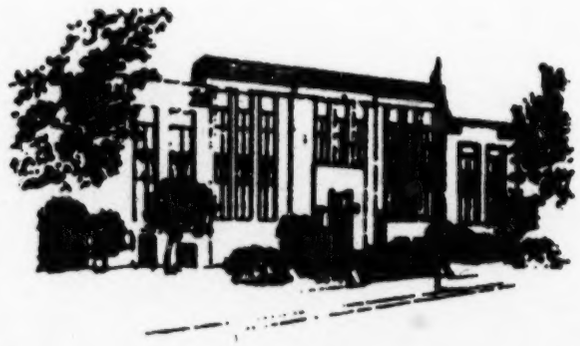

County of Van Zandt

294th Judicial District
Phone 903-567-6576

August 22, 2000

App. 1

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